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FEDERAL ELECTION COMMISSION
Washington, DC 20463

January 18, 2001

AGENDA ITEM

For Meeting of: 1-25-01

MEMORANDUM

TO: The Commission

THROUGH: James A. Pehrkon
Staff Director

FROM: Lois G. Lerner -
Acting General Counsel

N. Bradley Litchfield
Associate General Counsel

Jonathan M. Levin 12
Senior Attorney

Subject: Draft AO 2000-40

Attached is a proposed draft of the subject advisory opinion. We request that this draft be placed on the agenda for January 25, 2001.

Attachment

1 ADVISORY OPINION 2000-40

2
3 The Honorable Jim McDermott
4 U.S. House of Representatives
5 Washington, DC 20515-4707
6

DRAFT

7 Dear Mr. McDermott:

8 This responds to your letter dated December 4, 2000, requesting an advisory
9 opinion concerning the application of the Federal Election Campaign Act of 1971, as
10 amended ("the Act"), and Commission regulations to the establishment of a legal expense
11 fund and donations to the fund by other Members of Congress using their principal
12 campaign committees.

13 You are a Member of the U.S. House of Representatives from the Seventh District
14 of Washington. You have set up a legal defense fund named the Jim McDermott Legal
15 Expense Trust ("Legal Expense Trust " or "Trust") for the purpose of paying legal
16 expenses arising from the case of *Boehner v. McDermott*, a matter which is now pending
17 before the U.S. Supreme Court. This fund is "separate and apart" from your principal
18 campaign committee. You state that Representative Fortney H. (Pete) Stark of California
19 and other members of Congress have offered to donate excess campaign funds to the
20 Legal Expense Trust and have authorized you to ask whether such donations would be
21 permissible under the Act.

22 ***Factual Background***

23 ***Boehner v. McDermott***

24 This matter involves a civil suit against you filed by Representative John Boehner
25 of Ohio alleging that you knowingly disclosed an unlawfully intercepted communication
26 in violation of the Electronic Communications Privacy Act at 18 U.S.C. §§2511(1)(c),
27 2520. In December 1996, Mr. Boehner, then the Chairman of the House Republican
28 Conference, participated, via cellular telephone from Florida, in a conference call with
29 several other House Republican leaders. The participants discussed the leadership's
30 response to findings about to be issued by the House Committee on Standards of Official
31 Conduct ("Ethics Committee") with respect to the conduct of Speaker Newt Gingrich,
32 and to the Speaker's expected agreement to accept a reprimand and pay a fine. A Florida

1 couple tape recorded the conversation from a police scanner in their car, and later met
2 with a Democratic Representative from Florida to discuss the tape. At the Member's
3 suggestion, the couple personally delivered the tape to you on January 8, 1997. You were
4 then the ranking Democratic Member of the Ethics Committee. On the next day, you
5 gave copies of the tape to three major newspapers, which then ran stories on the party
6 leaders' conversation. Shortly thereafter, you provided a copy of the tape to the other
7 Members on the committee and resigned from the committee. The committee chairman
8 then delivered a copy to the U.S. Department of Justice. No criminal charges were
9 brought against you.¹

10 Mr. Boehner filed the civil suit against you in U.S. District Court in the District of
11 Columbia in March 1998. In July 1998, the district court granted your motion to dismiss
12 the case, concluding that your actions were protected by the First Amendment. *Boehner*
13 *v. McDermott*, No. CIV. 98-594 TFH, 1998 WL 436897 (D.D.C. July 28, 1998). In
14 September 1999, the U.S. Court of Appeals for the D.C. Circuit reversed the district
15 court's decision and remanded the case back to the district court. *Boehner v. McDermott*,
16 191 F.3d 463 (D.C.Cir.1999). You filed a petition for *certiorari* on April 25, 2000.
17 *Certiorari* has yet to be granted or denied.²

18 *Legal Expense Trust Approved By House Ethics Committee*

19 You enclose a copy of the letter from the House Ethics Committee, dated October
20 6, 2000, that conditionally approved the establishment of the Legal Expense Trust. You
21 also provided a copy of your September 21, 2000, letter to the committee requesting
22 approval of the establishment of the Trust, along with a copy of the proposed agreement
23 establishing the Trust. The trust agreement between you, as trustor, and another
24 individual, as trustee, empowers the trustee to accept funds, property, and services to pay
25 legal fees and charges with respect to the purposes described below and Trust
26 administration.

¹ The Florida couple pled guilty to unlawful interception of the call, and they were fined.

² The above account of the background for *Boehner v. McDermott* was derived principally from the opinions issued in the district and appellate court cases and from Advisory Opinion 1997-27 in which the Commission concluded that Mr. Boehner's use of his campaign funds to finance his suit against you was permissible under 2 U.S.C. §439a and 11 CFR Part 113.

1 The agreement describes the purposes of the trust as follows:

2 2. Trust Purpose. The sole and exclusive purpose of the Trust is to
3 provide a proper means for the acceptance of money, property and
4 services, including, if necessary, pro bono legal services, to provide for all
5 reasonable, necessary and appropriate legal fees or charges incurred by the
6 Trustor in connection with his official duties and position in Congress, and
7 matters bearing on his reputation or fitness for office. To such end, the
8 Trust shall be available to pay all reasonable, necessary and appropriate
9 expenses of the Trustor's counsel and such other and usual, customary
10 expenses that have been or may be incurred in connection with the above-
11 stated purpose. The Trust may not be used to pay any legal expenses that
12 arise in connection with a matter that is primarily personal in nature. Trust
13 funds may be used for no purpose other than that specifically provided
14 herein. All such payments may be made by the Trustee from either
15 principal and/or income.
16

17 In granting you permission, the Ethics Committee noted that the purpose of the
18 Trust would be to pay legal expenses arising from *Boehner v. McDermott*, and stated that
19 "[y]our letter further indicates that consistent with the requirements of the [Ethics
20 Committee's] Legal Expense Fund Regulations, these expenses have arisen in connection
21 with your official duties and position in Congress and that the matter is one that bears on
22 your reputation and fitness for office." The Ethics Committee also stated that the terms
23 of the Trust appeared to be consistent with the Legal Expense Fund Regulations and went
24 on to describe the public filing and disclosure requirements for such legal expense funds.

25 The Ethics Committee specifically noted that the purpose stated in the Trust
26 agreement is broader than merely the expenses for *Boehner v. McDermott* and that,
27 consistent with Ethics Committee regulations, the agreement states that the Trust may not
28 be used to pay any legal expenses that arise in connection with a matter that is "primarily
29 personal in nature." The committee asked that you contact it for further guidance if any
30 question arises as to whether a particular expense is properly payable out of the Trust.
31 The committee also stated its understanding that the Trust agreement provides for the
32 payment for legal service provided to you only, and to no other individual.

33 Although not specifically addressed in the Ethics Committee letter, the
34 Commission also notes that the Trust agreement provides that the trust assets shall be
35 maintained in accounts established for the exclusive purpose of administering the Trust,

1 and segregated from your "personal, political, or official funds." In addition, it provides
2 that, upon completion of the Trust, any funds or assets remaining in the Trust, shall be
3 distributed by the Trustee, in his sole and absolute discretion, to the contributors to the
4 Trust, on a *pro rata* basis.

5 *Analysis*

6 To respond to your question, the Commission must discuss the nature of the Legal
7 Expense Trust and whether the donation of your campaign funds to the Trust would be
8 "personal use" under the Act and Commission regulations. The Commission then
9 addresses whether the donation of another Member's campaign funds to the Trust would
10 constitute "personal use," and, if so, whether the Act and Commission regulations
11 prohibit the Trust's use of such campaign funds.

12 Under the Act and Commission regulations, a candidate and the candidate's
13 committee have wide discretion in making expenditures to influence the candidate's
14 election, but may not convert campaign funds to the personal use of the candidate or any
15 other person. 2 U.S.C. §§431(9) and 439a; 11 CFR 113.1(g) and 113.2(d); *see also*
16 Advisory Opinions 2000-37, 2000-12, 1998-1, and 1997-27. Commission regulations
17 provide guidance regarding what would be considered personal use of campaign funds.
18 Personal use is defined as "any use of funds in a campaign account of a present or former
19 candidate to fulfill a commitment, obligation, or expense of any person that would exist
20 irrespective of the candidate's campaign or duties as a Federal officeholder." 11 CFR
21 113.1(g). Moreover, 2 U.S.C. §439a and 11 CFR 113.2(a) and (d) specifically provide
22 that a Member of Congress may use excess campaign funds to pay any ordinary and
23 necessary expenses incurred in connection with his or her duties as a holder of Federal
24 office, and may use such funds for "any other lawful purpose."

25 Commission regulations list a number of expense categories that would constitute
26 personal use. 11 CFR 113.1(g)(1)(i). Where a specific use is not listed as personal use,
27 the Commission makes a determination on a case-by-case basis, using the regulation's

1 definition of personal use at 11 CFR 113.1(g). 11 CFR 113.1(g)(1)(ii).³ Legal expenses
2 are among those uses to be analyzed on a case-by case basis. 11 CFR 113.1(g)(1)(ii)(A).
3 See Advisory Opinions 1998-1, 1997-27, 1997-12, and 1996-24.

4 Based on the underlying circumstances of *Boehner v. McDermott*, the
5 Commission concludes that the donation of funds from your principal campaign
6 committee, Friends of Jim McDermott, to the Legal Expense Trust would be permissible
7 because it would entail the use of campaign funds for an expense that would not exist
8 irrespective of your duties as a Federal officeholder. The conduct that is at issue in
9 *Boehner v. McDermott* resulted directly from activities that you engaged in because of
10 your position at the time as Ranking Minority Member of the Ethics Committee. The
11 issue of the finding as to the Speaker's activities and the resulting disciplinary action was
12 a matter of great interest in the House of Representatives. Any discussion by House
13 Republican leaders of how to react to the pending agreement between the Speaker and the
14 Ethics Committee would have been of significant concern to you because of your position
15 as Ranking Member and your prior consideration of the Speaker's activities as a member
16 of the committee, and it appears that you received the tape because of your position. See
17 Advisory Opinion 1997-27 where the Commission concluded that Mr. Boehner could use
18 campaign funds to finance his case against you based on the fact that his involvement in
19 the conversation was in pursuit of his duties as a Member and as part of the House
20 Republican leadership, and the fact that the unlawful interception or disclosure for which
21 he seeks the judicial remedy of compensation occurred as a result of interest in the
22 content, which related to the House Republican leadership and the Ethics Committee, and
23 interest in the fact that the participants were House Republican leaders.

24 The Commission concludes that the donation of your campaign funds to the Trust
25 is permissible on the assumption that the Trust's funds will be used only for: (1) expenses

³ In explaining the application of the case-by-case approach, the Commission:
reaffirm[ed] its long-standing opinion that candidates have wide discretion over the use
of campaign funds. If the candidate can reasonably show that the expenses at issue
resulted from campaign or officeholder activities, the Commission will not consider the
use to be personal use.

Explanation and Justification, *Expenditures; Reports by Political Committees; Personal Use of Campaign Funds*, 60 Fed. Reg. 7862, 7867 (February 9, 1995).

1 related to *Boehner v. McDermott* or other legal expenses arising out of the same set of
2 facts; (2) the administrative expenses necessary to administer the Trust (including
3 reasonable compensation to the Trustee); and (3) the dissemination of funds remaining at
4 the termination of the Trust in accordance with the Trust agreement in order to prevent
5 the personal use of your campaign funds by others. The Commission also assumes that
6 the Trust accounts will be segregated from any other accounts, such as your personal
7 accounts. The Commission notes that, even though the Ethics Committee concluded or
8 assumed that the expenses "have arisen in connection with your official duties and
9 position in Congress," the Commission has the authority to interpret and enforce the
10 personal use prohibition of 2 U.S.C. 439a and should reach its own conclusions as to
11 whether personal use of campaign funds would result. See *Explanation and Justification,*
12 *Expenditures; Reports by Political Committees; Personal Use of Campaign Funds*, 60
13 *Fed. Reg.* 7862, 7871 (February 9, 1995).

14 The regulations on personal use also address "third party payments" to candidates
15 at 11 CFR 113.1(g)(6). Notwithstanding that the use of funds for a particular expense
16 would be a personal use under 11 CFR Part 113, payment of that expense by any person
17 other than the candidate or the campaign committee shall be a contribution under 11 CFR
18 100.7, unless the payment would have been made irrespective of the candidacy. The
19 regulations list three examples of payments that are considered to be irrespective of
20 candidacy. One of the examples is "a donation to a legal expense trust established in
21 accordance with the rules of the United States Senate or the United States House of
22 Representatives." 11 CFR 113.1(g)(6)(i). Therefore, donations to the Jim McDermott
23 Legal Expense Trust would not be contributions, and would not be subject to the
24 limitations and prohibitions of the Act. See 2 U.S.C. §§441a, 441b, 441c, 441e, 441f, and
25 441g.

26 Commission regulations at 11 CFR 113.1(g)(6)(i) permit unlimited donations to a
27 legal expense trust, but do not address whether a candidate or Member of Congress may
28 use any of his campaign funds to donate to such a trust. Although your legal expenses for
29 *Boehner v. McDermott* would not exist irrespective of your duties as a Federal
30 officeholder, they do exist irrespective of the duties of other Federal officeholders,

1 including other Members who wish to donate their campaign funds to the Trust. Given
2 your formation of a legal expense trust, under House rules, for legal expenses that would
3 not exist irrespective of your officeholder duties, a different approach may be appropriate.

4 The Commission has concluded that donations to a legal expense trust, formed
5 and implemented under the rules of the U.S. House of Representatives, are not
6 contributions even though in certain circumstances the use of such trust funds could be a
7 personal use under 11 CFR 113.1(g). Such expense trusts are specifically established
8 independently of a campaign, and are used for several purposes other than influencing a
9 Federal election, including legal expenses related to the performance of the officeholder's
10 official duties or position in Congress. Moreover, they are formed under House rules
11 (Rule 26) and interpretations issued by the Ethics Committee which restrict the trusts'
12 purposes, the sources and uses of donations, and the disposition of any residual funds. In
13 singling out trusts governed by House (and U.S. Senate) rules, the Commission stated
14 that donations to other legal expense funds are not so protected and are to be "examined
15 on a case by case basis." 60 *Fed. Reg.* at 7871. Therefore, it is clear that the Commission
16 has granted special status to legal expense trusts established under Congressional rules.⁴

17 The House rules allow Members to use their campaign funds to support another
18 Member's trust, and also impose a \$5,000 yearly limit on donations from any individual
19 or organization.⁵ In view of the nature of these trusts as special vehicles created under
20 House rules, and the fact that the use of the funds donated to the trust will be related to
21 your duties as an officeholder, and not for your personal use under the Act and
22 Commission regulations, the Commission will follow, in these special circumstances, the
23 treatment accorded by the House of Representatives with respect to the use of campaign
24 funds of its Members. Therefore, in the case of a House Member's legal expense trust
25 where the funds are to be used exclusively for expenses that do not arise irrespective of
26 the trustor's officeholder duties, donations by other Members from their campaign funds,

⁴ Such deference has been granted even though the legal expense trust for a House Member may be set up for legal expenses arising in connection with his or her candidacy for or election to Federal office.

⁵ The House rules also prohibit contributions from registered lobbyists or agents of foreign principals.

1 if permitted under the rules of the House, will be viewed as a use of such funds "for any
2 other lawful purpose." 2 U.S.C. §439a, 11 CFR 113.2(d). The Commission therefore
3 concludes that, under the facts and conditions presented in your request, the Friends of
4 Jim McDermott may accept donations from the principal campaign (or other authorized)
5 committees of Mr. Stark and other House Members. Such donations will not be
6 contributions under the Act; nor will they be a prohibited personal use of campaign funds.
7 Any authorized committee that makes such donations to the Trust is, however, required to
8 disclose them as other disbursements on reports it must file under the Act and
9 Commission regulations. 2 U.S.C. §434(b)(4)(G) and (6)(A); 11 CFR 104.3(b)(2)(vi)
10 and (4)(vi).

11 The Commission expresses no opinion regarding the application of any rules of
12 the U.S. House of Representatives or any tax ramifications of the proposed activity
13 because those issues are not within its jurisdiction.

14 This response constitutes an advisory opinion concerning the application of the
15 Act, or regulations prescribed by the Commission, to the specific transaction or activity
16 set forth in your request. See 2 U.S.C. §437f.

17 Sincerely,

18
19 Danny L. McDonald
20 Chairman

21
22 Enclosures (AOs 2000-37, 2000-12, 1998-1, 1997-27, 1997-12, and 1996-24)
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